

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONICA VERONICA FORDWADE, a/k/a
MONICA FORD-WADE,

Defendant-Appellant.

UNPUBLISHED
December 3, 2002

No. 235006
Oakland Circuit Court
LC No. 00-175125-FH

Before: O'Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial conviction of felonious assault, MCL 750.82, for which she was sentenced to serve eighteen months of probation and six months in jail, with work release privileges. We affirm.

The prosecution alleged that during the afternoon of September 24, 2000, defendant and her husband, the complainant, became engaged in a heated argument in their home. Defendant, then a Detroit police officer, retrieved her service firearm from her purse, pointed it at the complainant's head, and stated that she would blow his head off. The complainant picked up a telephone and dialed 9-1-1, which immediately began recording the incident even before the dispatcher had answered the call. On the tape-recording of the call, the complainant is heard repeatedly telling defendant to drop the gun, and defendant is heard telling the complainant not to call 9-1-1.¹ Defendant and the complainant struggled and the complainant eventually obtained possession of the firearm. Although the 9-1-1 call was disconnected during the struggle, the dispatcher called back and talked to the complainant. When police officers arrived at the scene, the complainant came out of the house with the firearm tucked in his pants. Defendant was arrested and charged with felonious assault. In a pretrial interview with police, defendant made certain inculpatory admissions. At trial, defendant testified that the complainant beat her about the head and face during an argument and then retrieved defendant's firearm from her purse, at

¹ The 9-1-1 tape-recording was played for the jury, but not transcribed into the record. Evidence of its general content, however, was presented through witness testimony.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

which point the two struggled for the weapon. Defendant asserted that she never had possession of the weapon. A jury convicted defendant as charged.

On appeal, defendant first argues that the trial court transgressed both the confrontation clause of the federal constitution and MRE 806 when prosecution witnesses were permitted to testify as to the complainant's hearsay statements at the scene pursuant to the excited utterance hearsay exception, MRE 803(2), but the defense was not permitted to impeach the complainant's credibility with testimony of inconsistent statements he had made. Notwithstanding defendant's failure to argue for admission of the testimony on these grounds below, we may still take notice of plain error affecting defendant's substantial rights. MRE 103(d); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994).

We agree with defendant that impeachment of a hearsay declarant—in this case, the complainant, who did not testify at trial—was clearly permissible under MRE 806, which permits a party to attack the credibility of a hearsay declarant “by any evidence which would be admissible for those purposes if declarant had testified as a witness.” Rule 806 further expressly provides that a hearsay declarant, whose inconsistent statements are used against him for purposes of impeachment, need not be afforded an opportunity to deny or explain these statements. The underlying rationale for Rule 806 is to treat the hearsay declarant as a witness testifying from the witness stand. In this case, by introducing the complainant's hearsay statements, the prosecution placed the complainant's credibility in issue. Fairness dictates that he be subject to impeachment and support as though he had in fact testified. See *United States v Wali*, 860 F2d 588, 591 (CA 3, 1988); *United States v Brainard*, 690 F2d 1117, 1127-1128 (CA 4, 1982). See also MRE 608, 609. Thus, the complainant's inconsistent statements at the scene and later, which the defense sought to admit through the testimony of defense witnesses, were erroneously excluded in violation of MRE 806.

The principles underlying MRE 806 are similarly encompassed by a criminal defendant's state and federal constitutional right to present a defense and to confront her accusers. Const 1963, art 1, § 13; US Const, Ams VI, XIV. The credibility of a witness is an issue that is of the utmost importance in every case and, thus, as part of a defendant's constitutional right to present a defense, she is guaranteed a reasonable opportunity to test the truthfulness of each witnesses' testimony. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Here, while we agree that the constraints placed on defendant's ability to impeach the complainant infringed MRE 806 and defendant's right to present a defense, we cannot conclude that her Sixth Amendment right to confront her accuser was violated where it appears from the record that she had the option to call the complainant to testify, but chose not to for unstated reasons. The confrontation clause allows a criminal defendant to demand the physical presence of a declarant and an opportunity to cross-examine that person. *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). See also *Davis v Alaska*, 415 US 308, 315-316; 94 S Ct 1105; 39 L Ed 2d 347 (1974) (confrontation means the ability to confront the witness physically and cross-examine the witness). Thus, because defendant's right of confrontation was not denied by any action of the trial court, we find no violation of the right.

Defendant also challenges the trial court's decision to preclude defendant from testifying as to the thoughts and fears that the complainant had communicated to her about surgery he had recently undergone, his complaint that defendant was not supportive, and his statements that may have led to the assault for which defendant was convicted. We agree that preclusion of this

testimony on hearsay grounds contradicted the longstanding principle that evidence establishing an individual's state of mind will not be precluded by the hearsay rule. *People v Fisher*, 449 Mich. 441, 449-450; 537 NW2d 577 (1995); *People v Ortiz*, 249 Mich App 297, 307-310; 642 NW2d 417 (2001). See also MRE 803(3). An utterance is admissible to show its effect on the hearer; the hearsay rule does not preclude such evidence because the utterance is not being offered to prove the truth or falsity of the matter asserted. *Fisher, supra*, citing 4 Weinstein, Evidence, P 801(c)[01], pp 801-94 to 801-96. Here, marital discord and motive were at issue, especially given that felonious assault is a specific intent offense. *Id.* at 450; *Ortiz, supra* at 310. Thus, the statements of the complainant regarding his state of mind were admissible to show their possible effect on defendant.

Although we have found that plain error occurred, we are unable to say that the error affected defendant's substantial rights. To affect substantial rights, plain error must have resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings, independent of the defendant's innocence. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Having reviewed the entire record, we cannot say that either of these circumstances resulted from defendant's conviction. First, the prosecution's case against defendant was strong. Independent, credible evidence of the assault was presented by the testimony of the responding police officers, admission of the 9-1-1 tape-recording, and defendant's own inculpatory statements when interviewed by the police. See *People v Hendrickson*, 459 Mich 229; 586 NW2d 906 (1998). In addition, defense witnesses Valeria Graves and defendant were effectively impeached by the prosecutor on cross-examination. We find it highly unlikely that defendant is actually innocent of the offense. Second, although defendant was precluded from presenting some impeachment and state of mind evidence, we find that she was not completely denied her right to present a defense. Indeed, the jury heard testimony of the complainant's inconsistent statements regarding the incident and also heard defendant testify regarding the complainant's state of mind leading up to, and during, the incident. We are not persuaded that the substance of the excluded testimony would have had any effect on the outcome of the proceeding. *Carines, supra*.

Defendant next argues that the prosecutor improperly asked defendant repeatedly whether she believed that prosecution witnesses had lied during their testimony. Because defendant failed to timely and specifically object at trial to the prosecutor's conduct, our review is again for plain error that was outcome determinative. *Carines, supra*; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

In *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), the Michigan Supreme Court held that it is improper for a prosecutor to ask the defendant to comment on the credibility of prosecution witnesses because credibility determinations are the domain of the trier of fact. This Court has restated this holding on numerous occasions. See, e.g., *People v Loyer*, 169 Mich App. 105, 116-117; 425 NW2d 714 (1988); *People v Bettistea*, 173 Mich App 106, 116; 434 NW2d 138 (1988); *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995), *aff'd sub nom People v Grove*, 455 Mich 439 (1997); *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997); *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001). Given this

long line of precedent, we find the prosecutor's conduct in this case unacceptable and urge her in the strongest terms to purge this tactic from her already formidable arsenal.²

Notwithstanding our dismay with the prosecutor's conduct, we are compelled to conclude that the error was harmless because, as explained above, defendant's substantial rights were not prejudiced. *Carines, supra*. In *Buckey*, for example, the Supreme Court found the prosecutor's improper questioning to be harmless even though it was conceded that the prosecutor's strategy was to discredit the defendant by inviting him to label the prosecution witnesses as liars.

Further, although defense counsel at one point objected to the prosecutor's questioning of defendant, it was on the basis that the prosecutor had misconstrued defendant's testimony, not that she had improperly asked defendant to comment on the witnesses' credibility. Had defense counsel made a proper objection, any prejudice could have been cured, either by prohibiting the prosecutor from continuing with the questioning or by the trial court giving a suitable cautionary instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Under these circumstances, the error does not warrant reversal.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Barbara B. MacKenzie

² The prosecutor's conduct was neither isolated nor inadvertent. We counted twelve instances where the prosecutor attempted to goad defendant into accusing prosecution witnesses—fellow law enforcement officers—of lying. Compounding the error, the prosecutor took the opportunity during closing argument to chastise defendant for being “vague” in her answers to these improper questions.